THE DEFENDANT'S RIGHTS UNDER ENGLISH LAW. By DAVID FELLMAN. Madison, Wisconsin: University of Wisconsin Press. 1966. Pp. 130. $4.00.

I do not know what personal experience Mr. Fellman has of British courts and institutions. It must be considerable; for I would not think it possible to write with such authority and accuracy about such sensitive questions as the defendant's rights without having been closely involved one's self. At least that is what I find whenever I try to deal with any questions of American law.

Defendant's Rights is a survey of the various stages of a criminal prosecution in England. It begins with an account of the English criminal courts which is commendably short and concise. Points of detail which I would like to raise by way of comment are these:

(1) Where there is an appeal from a magistrate's court to Quarter Sessions, the appeal is heard without a jury (p. 8). This is so because either the offence is a summary offence (*i.e.*, one where the defendant is not entitled to a jury trial), or an indictable offence which the defendant has elected to have tried summarily. Thus, the defendant either had no right to a jury, or he chose to forego it.

(2) Mr. Fellman explains that "either party may ask the Court of Quarter Sessions to have a case stated for the opinion of the High Court" on legal questions. Later he says, "in addition, appeal to Quarter Sessions may be abandoned by taking an appeal directly from a magistrate's court to the High Court on a point of law" (p. 9). The meaning of this is not clear, at least not to me. There need be no "abandonment" of any appeal to Quarter Sessions. The defendant has a choice either of appeal to Quarter Sessions on a point of law or fact, and a retrial of the whole issue without a jury; or, he may, as the prosecution may also, state a case for the High Court. "Stating a case" means that the parties agree upon the facts and make a statement of them for the opinion of the High Court upon a point of law. It is then like a student's moot court argument.

(3) I have no reason to doubt the statement that the magistrates' courts "handle about 97% of all the criminal cases in England and Wales" (p. 5). However, these figures should be viewed in perspective, for they include every minor traffic infraction, including "parking," all of which, until recently, have been dealt with by prose-

cution through the ordinary courts. Since 1960,[1] it has been possible for local authorities to adopt a procedure for collecting "ticket fines" for certain minor traffic offences. The offender has the option of paying a fixed sum to the clerk of the court's office, or of submitting to prosecution in the ordinary way. I do not know how many jurisdictions have adopted this procedure, but in 1964 my information was that about thirty cities had done so. Hopefully, this practice will increase.

(4) Since the publication of the book, legislative action has been taken upon the recommendation (mentioned by Mr. Fellman on p. 127, footnote 39) that the Court of Criminal Appeal should be replaced by a new Division of the Court of Appeal.[2]

Chapters II-VI, which form the main body of the book, cover a selection of matters of absorbing interest to the lawyer, sociologist and to any intelligent layman. I think they should all be mentioned here, and I cannot do better than to list them from the table of contents.

> Chapter II. "The Preliminaries" (Arrest, Bail, Prosecution).
> Chapter III. "The Police and the Accused" (Police Interrogation, Confessions, Searches and Seizures, Use of Wrongfully Secured Evidence, Habeas Corpus).
> Chapter IV. "The Right to a Fair Trial" (Some Elements of a Fair Trial, Public Trial, The Concept of Natural Justice, Right to Counsel, Double Jeopardy).
> Chapter V. "Conduct of the Trial" (The Jury, Comment by the Judge).
> Chapter VI. "An Evaluation."

These are all matters which are currently the subject of much heart-searching in both countries. I would like to take up Mr. Fellman's discussions of each of these topics, but space forbids. It is most helpful to learn of the methods used abroad, provided the differences in the background of the problem are fully understood, and this is where Mr. Fellman's presentation is so good. He possesses a keen ability to explain to American readers the essential differences between the English and American approaches to these questions. Questions of basic rights, individual freedoms, due process and the like are not "constitutional questions" in England. There is no basic constitutional law; as Dicey said, "the general principles of the constitution (as for example the right to personal liberty or the right of public

[1] Road Traffic and Roads Improvement Act, 1960. 8 & 9 Eliz., 26.63.
[2] Criminal Appeal Act, 1966. *Citation not available at this time.*

meeting) are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the courts."[3] Many of the ideas of individual freedom and protection against the State, which are now a part of the American Constitution and the amendments thereto, originated in the English common law. The Writ of Habeas Corpus is an ancient and obvious example. In England, the enjoyment of these rights is always subject to the wish of the sovereign Legislature, whose enactments no court can question. Habeas Corpus can be suspended, and all individual rights taken away by the Legislature. However, such things have only happened in the modern era in times of grave national crisis, the obvious examples being the two World Wars.[4] English people are not worried about the safety of their "due process" rights, since their maintenance in times of peace is so strongly supported both by the Courts and the Legislature. Nevertheless, the Legislature could take them away if it decided to do so. All that the courts could do then would be to construe the legislation in the manner most favorable to the individual and in a manner consistent with the courts' ideas of natural justice; (p. 75 et. seq.) but the courts could not defy the words of the Legislature in the end. But as I say, the Legislature does not act in that way, and we continue to assume that it will not. The basic difference in approach relates to the question whether you prefer the ultimate decision in a democratic state to rest with appointed Supreme Court judges, or with the elected representatives of the people.

Mr. Fellman also deals with the rights of the individual in respect of police procedures, the right to bail, and the right to counsel. Again, in England, these are not questions of constitutional law. The awarding of bail, as Mr. Fellman points out, depends very much on the discretion of the court. The right to counsel is based upon statutory provision for legal aid, and again there is much scope for the exercise of the court's discretion in granting it. Confessions and admissions are controlled by the rule that they are only admissible if made "voluntarily" (p. 45); however, confessions may still be excluded on the ground that they were, in the view of the judge, unfairly or improperly obtained. In exercising this discretion, the judge takes into account whether or not the statements were made in accordance with the *Judge's Rules*—rules laid down *ex cathedra* by the judges for the conduct of the police in conducting investigations.

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[3] DICEY, THE LAW OF THE CONSTITUTION, 195.
[4] Liversidge v. Anderson, (1942) A.C. 206.

Observance of the rules is no guarantee of admissibility, and vice versa, for the judge again has a broad discretion.

These are all problems that American courts have had to meet and solve, and they have done so according to the construction they have placed upon the provisions of the Constitution. In England, the problems are similar but the context for solution is very different. As I have said, England has no constitutional guarantees; England is content to leave a broad discretion in the judge, who, as Mr. Fellman points out, occupies a position of the highest respect. The problem, as Mr. Fellman says, is "to find a correct balance between the needs of the police and the requirements of a fair trial." Many in England would take the view that such a balance cannot be laid down in a precise rule to be applied to every situation. Discretion is inevitable in many parts of the judicial system, and it is arguable at least that the best solution to these grave problems is to leave a discretion in the persons most properly equipped to exercise it fairly and impartially.

There are other differences which might be mentioned. When Mr. Fellman speaks of the idea of a fair trial, it is interesting to note that there is no "D.A." system in England; barristers are accustomed to appear in one case on behalf of the prosecution, and in another case on behalf of the defense. Indeed, at Oxford Quarter Sessions, I have seen the same two barristers appearing in successive cases, but they change sides. This system is thought to provide an added assurance of a fair presentation of the prosecution's case, because the prosecuting lawyer is not "prosecution minded," and his career does not depend on the number of convictions during the year.

Although there is provision for challenging prospective jurors, England has never developed the American practice of examining a juror in order to establish a cause for challenge.

The peremptory challenge is not in practice used; and, although the opportunity to challenge is thought to be an important guarantee of an impartial jury, it is thought that the fairest thing to do is to accept the jury as it comes.

We know very little of the workings of juries in England, yet there is much concern about their operation. The Times in July disclosed some interesting statements by recent jurors: "A Jewish woman whose family had been in a concentration camp swore that she would never send anyone to prison. A man who had himself been in gaol

(prison) agreed with her, saying he too would never convict anybody . . ."; and another who reportedly said, "I don't like the police, and I'll never convict anyone."

These are unusual cases and could possibly have been avoided by examining the jurors before the trial. The whole jury problem is a very serious one—a collection of local people is asked to listen to and concentrate for several days on all the details of a complicated story, on speeches by counsel and the summing up by the judge. It is probably the longest effort of intellectual concentration of their lives and takes place in a strange environment. The jury decision is often a matter of chance. It is paradoxical that so much effort is made to ensure the fairness and efficiency of so many aspects of the trial, but the crucial decision has to be left to such an unqualified group of people. I am not being overly critical, for I appreciate the importance of having the ultimate question decided by someone who is not part of the Government; and too, I have no better solution to offer.[5]

Mr. Fellman also discusses the thorny problem of the unpaid non-lawyer magistrates. I will not go into this in any detail, having had a previous opportunity to say something.[6] In defence of the lay magistrates, however, it should be appreciated that their lack of legal expertise need not be a serious handicap. At that level, few points of law arise; when they do, a competent clerk of the court is there to advise them (and I agree of course that the system does require a good clerk). Far more often than questions of law, there are questions of fact. In determining questions of fact, it is very arguable that the magistrates are the best body available. They sit in threes or fives, and there is certainly an advantage in having more than a single person (as is the case with a stipendiary magistrate) to decide issues of fact. Magistrates can at least be assumed to be persons of some intelligence and integrity; if their critics will not accept even that, I insist that, on balance, they are not inferior in these qualities to the average jury. Since, however, a large proportion of the cases coming before magistrates come on guilty pleas, the main questions for the magistrates to decide are those of disposal. Perplexing and difficult as these questions are, my own experience of magistrates, recorders and chairman of Quarter Sessions indicates that the magistrates, on the average, know as much or more about the penal and

[5] For the best study of the jury, see KALVEN & ZIESEL, THE AMERICAN JURY (1966).

[6] 18 U. MIAMI L. REV. 517 (1964).

treatment institutions as do the professional lawyers. The magistrates visit them much more often, and are better informed about local conditions, and they certainly take great trouble over the question of finding the best, or perhaps the least inappropriate, sentence. Recently a scheme has been introduced which requires a magistrate to take certain training in law and procedure before sitting; and it is interesting to note also that the judges have been holding a number of conferences and exercises on sentencing.

In short, *The Defendant's Rights Under English Law* is excellently written and produced. There are one or two minor errors—Miss Wootton is a Baroness, J. B. Priestley is spelled wrong, there is a misprint on p. 17, and my good friend, D. Seaborne Davies, Professor of Law at the University of Liverpool will hardly recognize himself under two other references as D. S. Davies (p. 117), and D. R. S. Davies (p. 118). And a table of cases would be helpful.

This small book is an excellent presentation of the English law and practice on a number of questions of crucial importance both to England and to the United States. It is most informative, and well supported by authority. It should be both an exposition to the non-specialist, and an apértif to those who wish to know more. It will be of interest to, and enjoyed by, the general reader in addition to the professional. And if I may add a personal note, it would be one of regret that I heard of the book in August and not in June; for I had the pleasure of teaching a course on English and American Penology at the University of San Diego School of Law this past Summer. The book would have been ideal. If I should be invited again, it will be assigned as compulsory reading.

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